VIMALA SANGARI R NATHAN v. LOH CHEN YOOK

COURT OF APPEAL, PUTRAJAYA
HAMID SULTAN ABU BACKER JCA
ABANG ISKANDAR JCA
HASNAH MOHAMMED HASHIM JCA
[CIVIL APPEAL NO: N-02(NCVC) (A)-215-01-2017]
10 NOVEMBER 2017

LAND LAW: *Caveat – Private caveat – Application for removal – Whether applicant has locus under s. 327 of National Land Code – Whether steps taken by caveator to perfect title or interest in property upon entering caveat – Whether applicant affected by presence of sterile caveat – Whether applicant an aggrieved person*

The appellant purchased a property under a judicial sale of a legal charge pursuant to s. 256 of the National Land Code ('NLC'). Six years prior to the judicial sale, the respondent had entered into a conditional sale and purchase agreement to purchase the property. Although the respondent had not paid the full purchase price or discharged the legal charge, he had entered a caveat on the property to protect his interest. The High Court, in disallowing the appellant's application for the removal of the caveat lodged by the respondent, ruled that the appellant was not an aggrieved party under s. 327 of the NLC to give her the *locus* to make the application. Hence, this appeal by the appellant who contended that the caveat was sterile in nature as the respondent, upon entering of the caveat, had not taken any steps to perfect his title or his interest in the said property.

Held (allowing appeal with costs; setting aside judgment of High Court) Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:

(1) The caveat ought to be removed by any person who will have *locus* to remove the caveat under s. 327 of the NLC, *ie*, if he can demonstrate to the court that he is an aggrieved person in law. To be an aggrieved person in law, the applicant must demonstrate that his subsisting interest or acquired interest has been violently affected by the presence of the sterile caveat and/or non-sustainable caveat under the law. (para 9)

(2) The appellant had produced the certificate of judicial sale issued under s. 259 of the NLC. Consequently, in law, she fell under the category of aggrieved person who had the *locus* to make an application under s. 327 of the NLC to remove the caveat. Thus, the High Court Judge erred in law in refusing or failing to remove the sterile caveat *in limine* on the application of the appellant. (para 10)

A ***Bahasa Malaysia*** *Headnotes*

Perayu membeli sebuah hartanah bawah jualan kehakiman satu gadaian undang-undang menurut s. 256 Kanun Tanah Negara ('KTN'). Enam tahun sebelum jualan kehakiman tersebut, responden memasuki perjanjian jual beli bersyarat untuk membeli hartanah itu. Walaupun responden tidak membayar
B harga belian dengan sepenuhnya atau melepaskan gadaian tersebut, dia memasukkan kaveat atas hartanah tersebut untuk melindungi kepentingannya. Mahkamah Tinggi, dalam menolak permohonan perayu membatalkan kaveat yang dimasukkan oleh responden, memutuskan bahawa perayu bukan pihak terkilan bawah s. 327 KTN untuk memberikannya *locus* untuk memohon.
C Dengan itu, rayuan ini oleh perayu yang menghujahkan kaveat tersebut bersifat steril kerana responden, selepas memasukkan kaveat, tidak mengambil apa-apa langkah untuk menyempurnakan hak miliknya atau kepentingannya dalam hartanah tersebut.

D **Diputuskan (membenarkan rayuan dengan kos; mengetepikan penghakiman Mahkamah Tinggi)**
Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

E **(1)** Kaveat perlu dibatalkan oleh seseorang yang mempunyai *locus* membatalkan kaveat bawah s. 327 KTN, iaitu, jika dia boleh menunjukkan pada mahkamah bahawa dia terkilan dari segi undang-undang. Untuk menjadi orang yang terkilan dari segi undang-undang, pemohon perlu menunjukkan bahawa kepentingan sedia adanya atau kepentingan yang diperolehinya telah terjejas secara kasar dengan kewujudan kaveat steril dan/atau kaveat yang tidak boleh kekal dari segi
F undang-undang.

(2) Perayu telah mengemukakan sijil jualan kehakiman yang dikeluarkan bawah s. 259 KTN. Akibatnya, dari segi undang-undang, dia terangkum dalam kategori orang yang terkilan yang mempunyai *locus* untuk memohon bawah s. 327 KTN untuk membatalkan kaveat. Oleh itu,
G Hakim Mahkamah Tinggi khilaf dari segi undang-undnag apabila enggan atau gagal membatalkan kaveat steril *in limine* atas permohonan perayu.

Case(s) referred to:
Damai Jaya Realty Sdn Bhd v. Pendaftar Hakmilik Tanah Selangor [2015] 1 LNS 7 CA ***(refd)***
H *Eng Mee Yong & Ors v. Letchumanan [1979] 1 LNS 18 PC* ***(refd)***
Gondola Motor Credit Sdn Bhd v. Almurisi Holdings Sdn Bhd [1992] 4 CLJ 2212; [1992] 1 CLJ (Rep) 112 SC ***(refd)***
Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd [1997] 1 CLJ 396 CA ***(refd)***
Noratahar A Hamid v. Abdullah Hassan & Ors [2012] 1 LNS 122 HC ***(refd)***

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Paya Terubong Estates Sdn Bhd v. Pusaka Warisan Sdn Bhd [1998] 2 CLJ 909 CA ***(refd)***
RAP Nathan v. Hj Abdul Rahman Hj Yusoff & Ors [1979] 1 LNS 85 HC ***(refd)***
Rohaya Ali Haidar v. AmBank (M) Bhd [2016] 4 CLJ 563 CA ***(refd)***
Wong Kok Leong & Anor v. RHB Bank Bhd [2014] 1 LNS 1092 CA ***(refd)***
Wu Shu Chen & Anor v. Raja Zainal Abidin Raja Husin [1997] 3 CLJ 854 CA ***(refd)***

Legislation referred to:
National Land Code, ss. 256, 259, 327

For the appellant - Manian Raju & Zatul Izra Zulkefelee; M/s Krishna Dallumah, Manian & Indran
For the respondent - Balraj Singh; M/s Nora Hayati Raj

[Editor's note: Appeal from High Court, Seremban; Originating Summons No: 24NCVC-289-10-2016 (overruled).]

Reported by S Barathi

JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] The appellant/purchaser of a property under the judicial sale pursuant to the National Land Code (NLC) appeals against the decision of the learned High Court Judge who refused to remove a private caveat lodged by the respondent.

[2] The respondent had purchased the said property under a sale and purchase agreement executed six years or more before the judicial sale. The respondent has also not paid the full purchase price. The said sale and purchase agreement was a conditional sale and purchase agreement where the State Authority consent must be obtained. The said condition reads as follows:

> Tanah yang diberimilik ini tidak boleh dipindahmilik, dipajak, digadai melainkan dengan kebenaran bertulis daripada pihak berkuasa Negeri.

[3] On the date of hearing of the appeal, learned counsel for the respondent brought to the attention of the court that the appellant in his application for removal of the caveat did not produce the certificate of judicial sale. Learned counsel for the appellant conceded that the certificate of judicial sale was not disclosed and undertook to produce the same. Learned counsel agreed not to object on that issue if the certificate was produced.

[4] After hearing the parties, we adjourned our decision to enable the appellant to produce the judicial certificate and also for the parties to submit further on the phrase 'aggrieved party' stated in s. 327 of the NLC as the learned judge had specifically ruled that the appellant was not an aggrieved party under the said section to give her the *locus* to make the application which read as follows:

A **327. Removal of private caveats by the Court.**

(1) Any person or body aggrieved by the existence of a private caveat may at any time apply to the Court for an order for its removal, and the Court (acting, if the circumstances so require, *ex parte*) may make such order on the application as it may think just.

B **Jurisprudence Related To 'Aggrieved Person'**

[5] The dictionary meaning of 'aggrieved person' as a general rule appears to be multifold. In the context of specific legislation, courts have given a special meaning to the word 'aggrieved person' in the context of the particular legislation as a whole. One common threshold which appears to C run through most of the judicial meaning of 'aggrieved person' is that the person must be directly affected in his subsisting or acquired right by the conduct of third person and the law protects the said subsisting or acquired right. It cannot relate to a future right or prospective right, etc. For example, (a) the dictionary meaning of the aggrieved persons reads as follows:

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(i) *Black's Law Dictionary* defines 'aggrieved' as having suffered loss or injury, damnified or injured; and 'aggrieved party' as one whose legal right is invaded by an act complained of, or whose pecuniary interest is directly and adversely affected by a decree or judgment. One whose right of property may be established or divested. The word 'aggrieved' refers E to a substantial grievance, a denial of some personal, pecuniary or property right, or the imposition upon a party of a burden or obligation.

(ii) Some of the legal meaning of an aggrieved person in relation to legislation or case laws reads as follows:

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(a) In *Wu Shu Chen & Anor v. Raja Zainal Abidin Raja Husin* [1997] 3 CLJ 854; [1997] 2 MLJ 487, the Court of Appeal observed:

> The Code contains no definition on who is an aggrieved person. To my mind, the word 'aggrieved' must be given its ordinary meaning. To be aggrieved means one is G dissatisfied with or adversely affected by a wrongful act of someone. An aggrieved person is therefore a person whose legal right or interest is adversely affected by the wrongful act or conduct of another person or body. The category of aggrieved persons is never closed.

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(b) The Privy Council case of *Eng Mee Yong & Ors v. V Letchumanan* [1979] 1 LNS 18; [1979] 2 MLJ 212, as per Lord Diplock observed:

> It is for him to begin by satisfying the court that there are sufficient grounds in fact and law for treating him as a person claiming such an interest in the land as would, if it I were established, **make him aggrieved by the existence of the caveat.**

(c) *RAP Nathan v. Haji Abdul Rahman bin Haji Yusoff & Ors* [1979] 1 LNS 85; [1980] 1 MLJ 248 the court observed:

> The next point is whether the third defendant is a person aggrieved by the existence of the caveat as provided under section 327(1). A pertinent question that arises is whether he will suffer loss if the caveat lodged by the plaintiff is not removed.

(d) Quite recently, Harmindar Singh Dhaliwal JC (as His Lordship then was) in the case of *Noratahar bin A Hamid v. Abdullah Hassan & Ors* [2012] 1 LNS 122:

> In the instant case, however, the Plaintiff had produced evidence that he had paid the full purchase price through a letter by Bank Muamalat Malaysia Berhad, the chargee bank, dated 22 July 2011. This was also supported by a "Perintah Jualan oleh Mahkamah" issued by the Senior Assistant Registrar of the High Court Ipoh which was the Borang 16F of the NLC issued after property was sold at a court auction. So in effect, the Plaintiff was an aggrieved person in that if not for the caveats, the Plaintiff would have succeeded in becoming the registered owner of the said land.

Brief Facts

[6] The brief facts of the instant case in our own words can be summarised as follows:

(i) The appellant has purchased the property in a judicial sale of legal charge of Alliance Bank pursuant to s. 256 of NLC.

(ii) The respondent has prior to the judicial sale entered into a conditional sale and purchase agreement dated 22 November 2011 to purchase the said property for the sum of RM2,500,000 and had only paid a sum of RM500,000.

(iii) The respondent had not paid the balance purchase price or discharge the legal charge of Alliance Bank, but had placed a caveat on or about 24 November 2011 to protect his interest on the said property.

[7] The memorandum of appeal *inter alia* reads as follows:

> 1. Pesuruhanjaya Kehakiman tersilap dari sisi undang-undang dan/atau fakta apabila memutuskan bahawa kaveat yang dimasukkan oleh Responden/Defendan ke atas tanah bawah Hakmilik Geran PN 11243, Lot 6128, Mukim Si Rusa, Daerah Port Dickson, Negeri Sembilan Darul Khusus (selepas ini dirujuk sebagai 'hartanah tersebut') harus dikekalkan.

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2. Pesuruhanjaya Kehakiman tersilap di sisi undang-undang dan/atau fakta apabila gagal mempertimbangkan dengan sewajarnya atau sama sekali bahawa Perayu/Plaintif telah membeli hartanah tersebut melalui lelongan awam yang diadakan oleh Mahkamah Tinggi Seremban pada 18 Oktober 2016 yang merupakan "judicial sale".

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3. Pesuruhanjaya Kehakiman tersilap di sisi undang-undang dan/atau fakta apabila gagal mempertimbangkan dengan sewajarnya atau sama sekali bahawa Perayu/Plaintif telah mendapat hak milik yang tidak boleh disangkal (indefeasibility title) daripada pemegang gadaian Alliance bank (chargee bank).

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4. Pesuruhanjaya Kehakiman tersilap di sisi undang-undang dan/atau fakta apabila gagal mempertimbangkan dengan sewajarnya atau sama sekali bahawa pemegang gadaian telah mempunyai kepentingan berdaftar (registered legal interest) ke atas hartanah tersebut.

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5. Pesuruhanjaya Kehakiman tersilap di sisi undang-undang dan/atau fakta apabila gagal mempertimbangkan dengan sewajarnya atau sama sekali bahawa Responden/Defendan hanya memasukkan kaveat ke atas hartanah tersebut selepas hartanah tersebut digadaikan kepada Alliance bank (chargee bank).

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6. Pesuruhanjaya Kehakiman tersilap di sisi undang-undang dan/atau fakta apabila gagal mempertimbangkan dengan sewajarnya atau sama sekali bahawa Responden/Defendan telah gagal mengambil sebarang tindakan Mahkamah untuk menegakkan tuntutan atau haknya terhadap pemilik berdaftar meskipun kaveat telah dimasukkan ke atas hartanah tersebut selama 5 tahun.

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7. Pesuruhanjaya Kehakiman tersilap di sisi undang-undang dan/atau fakta apabila gagal mempertimbangkan dengan sewajarnya atau sama sekali bahawa pemegang gadaian dan pembeli *bona fide* di lelongan awam mempunyai kepentingan yang terlebih dahulu (priority daripada pembeli bawah perjanjian jual beli tanah.

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8. Pesuruhanjaya Kehakiman tersilap di sisi undang-undang dan/atau fakta apabila gagal mempertimbangkan dengan sewajarnya atau sama sekali bahawa tarikh penyempurnaan bagi perjanjian jual beli antara Responden/Defendan dan pemilik berdaftar telah luput.

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9. Pesuruhanjaya Kehakiman tersilap di sisi undang-undang dan/atau fakta apabila gagal mempertimbangkan dengan sewajarnya atau sama sekali bahawa Responden/Defendan tidak mempunyai hak *in rem* ke atas hartanah tersebut malahan Responden/Defendan hanya mempunyai hak *in personam* terhadap pemilik berdaftar tesebut.

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10. Pesuruhanjaya Kehakiman tersilap di sisi undang-undang dan/atau fakta apabila gagal mempertimbangkan dengan sewajarnya atau sama sekali bahawa remedi Responden/Defendan telah dinyatakan dalam perjanjian jual beli hartanah tersebut iaitu menuntut ganti rugi daripada pemilik berdaftar.

[8] It was contended before us by the appellant that it was wrong for the learned High Court Judge to have refused to remove the caveat when the caveat pursuant to well-established case laws was sterile in nature as the respondent upon the entering of the caveat has not taken any steps to perfect his title or his interest in the said property simultaneously. Support for the appellant's contention can be found in a number of cases, to name a few are as follows:

(i) In *Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd* [1997] 1 CLJ 396; [1996] 1 MLJ 223; Court of Appeal, per Gopal Sri Ram JCA (later FCJ), at p. 401 (CLJ); p. 229 (MLJ):

> It is a cardinal principle of law, that when a litigant seeks the intervention of the court in a matter that affects his rights, he must do so timeously. The maxim *vigilantibus, non dormientibus, jura subvenient*, though having its origins in the Court of Chancery, is of universal application. Even in cases where a right is exercisable *esdebit justitiae*, a court may refuse relief to an indolent litigant.

(ii) In *Paya Terubong Estates Sdn Bhd v. Pusaka Warisan Sdn Bhd* [1998] 2 CLJ 909; [1998] 2 MLJ 463; Court of Appeal, per Gopal Sri Ram JCA (later FCJ), at p. 914 (CLJ); p. 468 (MLJ):

> The importance of timeous institution and prosecution of proceedings in this area of the law is well brought out by the judgment of Sinnathuray J, in the Singapore High Court in *Teo Ai Choo v. Leong Sze Hian* [1982] 2 MLJ 12. It is a brief judgment and merits reproduction here:
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> The matter before me is a simple one. Mr KS Chung for the plaintiff has raised five serious points. I need only deal with the last one, the fifth point, that on the subject of delay.
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> First, I accept the decision in *Plimmer Bros v. St Maur* (1906) 26 NZLR 294. In that case, Stout CJ in New Zealand, on an application to remove a caveat, on facts similar to the present case, where the defendant had commenced no action against the plaintiff relating to the land in respect of which a caveat was lodged, referred to several reported cases and said:
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> > It was his duty to commence an action promptly if he considered himself entitled to specific performance...Here nothing was done for nearly sixteen months, and then a caveat was lodged. More than a month has elapsed since

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> then, and still no action has been commenced. In my opinion, an action for specific performance under such circumstances would be hopeless, and a caveat under such circumstances must be deemed vexatious ..in my opinion, to prevent a man dealing with his property after such a long delay is so inequitable that the court will not lend its assistance to such a proceeding.

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(iii) In *Damai Jaya Realty Sdn Bhd v. Pendaftar Hakmilik Tanah Selangor* [2015] 1 LNS 7; [2015] 2 MLJ 768, in dealing with issues related to judicial sale, observed:

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> [5] In the instant case, the certificate of sale and/or order for sale has not been set aside by the respondent and/or other relevant bodies. If the respondent and/or relevant authorities are aggrieved by the order of sale and/or certificate of sale, they have a duty and an obligation to make the necessary application to the court to set aside the order. However, what they cannot do is refuse to comply with an order of court. In *Badiaddin bin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 1 MLJ 393, the Federal Court observed:

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> > It is well settled that even courts of unlimited jurisdiction have no authority to act in contravention of written law. Of course, so long as an order of a court of unlimited jurisdiction stands, irregular though it may be, it must be respected. But where an order of such a court is made in breach of statute, it is made without jurisdiction and may therefore be declared void and set aside in proceedings brought for that purpose. It is then entirely open to the court, upon the illegality being clearly shown, to grant a declaration to the effect that the order is invalid and to have it set aside.

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[9] On the facts of the case and based on the cases cited above, we take the view that the caveat ought to be removed by any person who will have *locus* to remove the caveat under s. 327 of NLC. A number of persons may have *locus* to remove the caveat provided the person can demonstrate to the court that he is an aggrieved person in law. To be an aggrieved person in law, we take the view that the applicant must demonstrate that his subsisting interest or acquired interest, etc. has been violently affected by the presence of the sterile caveat and/or non-sustainable caveat under the law. Support for the proposition is found in a number of cases, to name a few are as follows:

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(i) In *Gondola Motor Credit Sdn Bhd v. Almurisi Holdings Sdn Bhd* [1992] 4 CLJ 2212; [1992] 1 CLJ (Rep) 112; [1992] 2 MLJ 650 Supreme Court, per Harun Hashim SCJ, at p. 119 (CLJ); p. 658 (MLJ):

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> At all material times, the option to purchase and the sale and purchase agreement were subject to the registered charge. Shaikh Mohamad was a director of Tg Petri and in turn a director of the respondent and was well aware of the existence of the charge on the subject land. In any event, the fact of registration of the charge is notice to all the world of its existence. Any dealing subsequent to the charge and with notice of the charge, as here, cannot defeat the indefeasible interest of the registered chargee and through him the purchaser at a judicial sale. The error in this case was to ignore the indefeasible title of the chargee and the continuous legal operation of the charge from the moment of its registration up to the completion of the judicial sale and the issue of the certificate of sale.
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> For the reasons stated, we would allow the appeal with costs here and below. The order of the learned judge is set aside. We order the removal of the caveat.

(ii) In *Rohaya Ali Haidar v. AmBank (M) Bhd* [2016] 4 CLJ 563; [2016] 2 MLJ 819 where Prasad Abraham JCA (as His Lordship then was), following the principles enunciated in *Gondola*'s case had stated:

> In our present case the earlier purchaser of the said land based on the letters of disclaimers issued by the respondent had their interest (if any) subject to the respective charges on the said lands. What the respondent should have done was to take immediate steps to redeem the land in question or part of it but had failed to do so. Therefore it follows that the interest of the purchasers would be subject to the registered charge and to the appellant who acquired the registered and indefeasible interest in the said land when they had paid.

(iii) In *Wong Kok Leong & Anor v. RHB Bank Berhad* [2014] 1 LNS 1092; [2015] 2 MLJ 385, the Court of Appeal held on the facts of the case as follows:

> (1) The respondent must comply with s. 281 and crystalise his cause of action by filing a suit and obtain a judgment and if necessary proceed with foreclosure proceedings as set-out in s. 281 of the NLC. If he fails to do so and/or if limitation has set in, s. 331 will become applicable to provide relief on the facts of this case and s. 328(1) of the NLC states that a private caveat shall lapse at the expiry of six years from the time it was lodged (see para 7).
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> (2) The appellants need not seek any declaration to get the lien holder's caveat removed and obtain the title to the relevant properties. The limitation issue will only apply to the respondent in respect of ss. 281 and 331 of the NLC, as to the cause of action. The appellant was not pursuing a cause of action against the respondents (see para 11).

A (3) A caveat has a specific purpose and is not a cause of action but a quick relief to protect interest (capable of being protected under the NLC) in the land in the nature of a statutory injunction and it is never meant to assist the indolent as in the instant case (see para 13).

B **[10]** We have read the appeal record and able submission of the parties. After giving much consideration to the submission of learned counsel for the respondent, we take the view that:

(i) the appellant has produced the certificate of judicial sale issued under s. 259 of the National Land Code and in consequence in law she will
C fall into the category of aggrieved persons whom we have mentioned earlier and will have the *locus* to make an application under s. 327 of NLC to remove the caveat;

(ii) the learned judge erred in law in refusing or failing to remove the sterile caveat *in limine* on the application of the appellant;

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[11] For reasons stated above, we allow the appeal with costs here and below, subject to the allocatur. The judgment of the High Court is set aside. The prayers in the application of the appellant are allowed.

We hereby order so.

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